

August 25, 2000

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United States Environmental Protection Agency
Title VI Guidance Comments
Office of Civil Rights (1201A)
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

Ladies and Gentlemen:

Comments on Draft Title VI Recipient and Investigations Guidance

Thank you once again for the opportunity to comment on this important guidance now under final consideration. We also thank the Director herself for listening to our comments on August 2, 2000 at the Carson Community Center.

The Los Angeles County Sanitation Districts (LACSD) are involved in municipal wastewater treatment and non-hazardous municipal solid waste disposal for over five million persons living within all or a portion of 78 cities and unincorporated areas of the County of Los Angeles. The siting and permitting and operation of the above essential public services are often extremely controversial, exacerbated by dynamic and dense demographics.

LACSD is both a direct and indirect recipient of EPA funding as well as a permittee of other local governments that receive EPA funding in some form. The theme of the comments that follow is simple: EPA should provide a timely, objective criteria-based approach to resolving alleged Title VI complaints recognizing the extensiveness and validity of some existing state programs.

An Acknowledgment of the Positive

We recognize the formidable task EPA faced addressing the reactions from the release of the *Interim Guidance* in February 1998. We believe EPA has done a good job:

a) by providing *Recipient Guidance* that should allow recipients to be more proactive in designing their environmental justice programs to hopefully minimize Title VI challenges, and

b) by providing more definitive timelines in some (but not all) of the *Investigation Guidance*, and

c) by recognizing that an issued permit is just that and is not stayed by any Title VI challenge under investigation, and

d) by recognizing that recipients should only be liable for those matters under their jurisdiction.

AREAS WHERE ADDITIONAL CONSIDERATION IS NEEDED

We believe that both Title VI Recipient and Investigations Guidance documents need to give additional consideration to the following areas to greatly improve the timeliness and efficiency of the process:

1. Further Recognition of Existing Comprehensive Local Environmental Justice Programs In Exchange for Expedited Processing

LACSD understands that EPA cannot delegate the administration of the Title VI program in its entirety to local recipients. However, in consideration of those states with highly developed cumulative toxics and EJ programs, a pre-review and approval by EPA should at least result in a presumption that the underlying analyses have been properly performed, are of adequate depth and breadth and that, as a consequence, a complaint can be dispatched within a period not to exceed 60 days.

The South Coast Air Quality Management District (SCAQMD) in conjunction with California state-mandated programs and legislation have the most rigorous environmental justice program in the United States. Many of these programs already put into practice what EPA suggests or hopes to accomplish with their guidance, including all of the technical analyses. We urge OCR to utilize the “due weight provisions” (39663) * and recognize the SCAQMD’s “comprehensive” Title VI approach (39657), both contained in the *Recipient Guidance* (39657), by examining the high degree of effectiveness of the local program here such that a guarantee of a greatly expedited review of complaints by OCR can ensue.

Some components of the local program are as follows:

* = Federal Register page numbers

State of California

AB 1807 – Tanner Toxics Act

This act established a process for identifying air toxics and establishing air toxics control measures (ATCMs) to be adopted and implemented by local air districts. The 1990 Clean Air Act Amendments re-created the federal NESHAPs program based upon this “technology based” control model.

AB 2728 – Toxic Air Contaminants: General Identification and Control Measures

This act incorporated all 188 Title III hazardous air pollutants into the AB 1807 process.

AB 2588 – Air Toxics “Hot Spots” Assessment and Information Act and SB 1731

AB1731 – Air Toxics “Hot Spots” Risk Reduction Audits and Plans

These acts require stationary sources to inventory emissions of air toxics and prepare risk assessments based upon the toxics emissions to identify potential air toxics “hot spots.” If a facility’s risk exceeds notification thresholds, it is required to notify the affected community of the risks. If the facility’s risk exceeds acceptable risk levels, it must prepare and implement a “risk reduction plan.”

Other California programs that directly or indirectly regulate emissions of air toxics are:

PROPOSITION 65 – California Safe Drinking Water and Toxic Enforcement Act

AB 3205 – Notification and Analysis Requirements for Air Contaminant Emissions Near Schools

AB 3374 – Air Monitoring of Disposal Sites

AB 3777 – Risk Management and Prevention Plans

South Coast Air Quality Management District Rules and Regulations

Rule 1401 – New Source Review of Carcinogenic Air Contaminants

This rule specifies limits for maximum individual cancer risk and excess cancer cases from new, modified, or relocated permit units, which emit carcinogenic air pollutants. The rule also places limits on many chemicals for which acute or chronic exposure thresholds have been established.

Rule 1402 – Control of TACs from Existing Sources

This rule specifies limits for maximum allowable carcinogenic and acute and chronic non-carcinogenic health risk from existing sources. The maximum carcinogenic risk that can be imposed by a *facility* on the maximally exposed individual is 25 chances in a million chances.

Rule 1403 – Asbestos Emissions from Demolition/Renovation Activities

This rule specifies requirements for demolition/renovation involving asbestos-containing materials.

Rule 1404 – Cr⁺⁶ Emissions from Cooling Towers

This rule bans the use of additives containing Cr⁺⁶ in industrial and HVAC cooling processes.

Rule 1405 – Control of Ethylene Oxide/CFC Emissions from Sterilization or Fumigation Processes

This rule limits ethylene oxide emissions from commercial and medical sterilization equipment, and from quarantine equipment and areas.

Rule 1406 – Control of Dioxin Emissions from Medical Waste Incinerators

This rule specifies a high degree of control of dioxin emissions from medical waste incinerators.

Rule 1407 – Control of Emissions of Arsenic Cadmium and Nickel from Non-Ferrous Metal Melting Operations

This rule requires reduction of arsenic, cadmium, and nickel emissions from non-ferrous metal melting operations.

Rule 1414 – Asbestos-Containing Serpentine Material in Surfacing Applications

This rule eliminates any future use of asbestos-containing serpentine material for the surfacing of unpaved areas.

Rule 1420 – Emissions Standard for Lead

This rule reduces lead emissions from stationary sources that process ambient lead.

Rule 1421 – Control of Perchloroethylene Emissions from Dry Cleaning Systems

This rule establishes perchloroethylene emission control requirements for dry cleaners.

Rule 212 – Standard for Approving Permits

This rule establishes requirements for public notification, among other things, before issuing permits.

Rule 461 – Gasoline Transfer and Dispensing

This rule reduces benzene emissions from the retail sale of gasoline.

Rule 1169 – Hexavalent Chromium (Cr⁺⁶) – Chrome Plating and Cr Acid Anodizing

This rule establishes stringent emission control requirements for chrome plating and chromic anodizing facilities.

Regulation XIII – New Source Review

Under this rule, emission controls equivalent to federal LAER, is required on all new and modified sources proposing to increase emissions by as little as one pound per day. In the process of controlling criteria pollutants to very low levels, the strict application of LAER, done without cost considerations, has greatly reduced corollary pollutants such as toxics.

California Environmental Quality Act (CEQA)

Furthermore, California agencies making permitting and land-use decisions must comply with the California Environmental Quality Act (CEQA). This statute, while modeled after NEPA, contains much more stringent substantive requirements to avoid or mitigate adverse environmental impacts than NEPA. CEQA requires that the potential environmental impacts of proposed projects be evaluated and that feasible methods to reduce or avoid significant adverse environmental impacts of these projects be identified. There is full public disclosure and discussion of projects under CEQA that go a long way to explain projects to the public. CEQA also requires a discussion of cumulative impacts, which are defined as “two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts.” Generally the agency must consider aggregate individual effects resulting from both single projects and separate projects, giving consideration to “closely related past, present, and reasonably foreseeable future projects.”

2. The *Investigations Guidance* Must Incorporate a Definitive Timeframe for Resolution of a Complaint

While we acknowledge that the revised *Investigation Guidance* has attempted to attach specific deadlines to individual milestone events within the complaint investigation process to a much higher degree than did the *Interim Guidance*, there is still no overall *definitive* timeframe by which a complaint must be resolved. Indeed, Appendix B to the *Investigations Guidance* (flowchart) makes the process seem endless. EPA can enter into informal resolution discussions with recipients that do not appear to have a specific deadline. Even an allegation rejected by OCR may be referred to another federal agency (39670). Most rejections of allegations can be resubmitted at a later time without prejudice (39673). EPA can waive the 180-day limit on filing a complaint after the alleged discriminatory action takes place for “good cause” (39673). Complaints that are subject to ongoing administrative appeals or litigation in federal or state court would be likely candidates for delay depending on the outcome of those decisions (39673). While EPA would likely close such complaints, “OCR expects to waive the time limit to allow complainants to refile their complaints after the appeal or litigation” (39673). LACSD urges OCR to adopt a procedure such that a complaint from start to finish can be completely dispatched within 180 days.

OCR may be galvanizing delay potential by requiring almost no substantiation of claims by complainants. EPA chooses instead to perform the underlying investigations itself which clearly can be a large and time-consuming task. If the April 1998 Shintech-

related Draft Revised Demographic Information report is any indication of the level of effort that will ultimately go into most investigations, it represents a very considerable effort that will overburden OCR.

3. *Investigations Methodology* Needs a Checklist Approach for More Certainty

While the *Investigations Guidance* represents a substantial elaboration over the *Interim Guidance* there are still large areas where uncertainty exists. Even in the situation where the subject permit represents a decrease in overall emissions or pollutants of concern at a facility, a seemingly sure-fire justification by EPA to reject a complaint (39677), much uncertainty can exist as to the significance of the overall decrease or whether the decrease will actually occur. In this situation, which we believe will be fairly common; EPA will resolve the uncertainty in favor of proceeding to investigate for potential discriminatory effects (39677). The disparate impact analysis and the determination of the significance of the disparity offer no certainty to either recipients or permittees. What is needed is a checklist approach of defined, specific analyses, that embodies bands or ranges of acceptability, and which, when performed, results in a definitive determination of discrimination or a dismissal of the complaint. A PSD-type approach might serve as an example for this more prescriptive approach or a no-net increase new source review program, with ground level impact analyses, for both criteria and toxics pollutants, such as those that exist at the SCAQMD.

4. The *Investigations Guidance* Should Include A Discussion of Discrimination in the Public Process

While EPA provides guidance on enhancing public participation in the *Recipient Guidance* no similar text is provided in the *Investigations Guidance* (39672). The guidance stipulates that allegations of discrimination in the public participation process should be filed within 180 days of the alleged action (39672). EPA sets forth the example that if a complainant alleges that the recipient improperly excluded them from participating in a hearing, then the complaint should be filed within 180 calendar days of that hearing. Two issues arise within this context. First, EPA has steered clear of including public participation guidelines in the *Investigation Guidance* reserving the right ("as appropriate") to do so in the unspecified future (39669). It seems inconsistent for EPA to steer clear of public participation investigation guidance yet to invite such complaints on the same subject. We urge EPA to commit to draft the public participation guidance quickly since it is our understanding that failure to be heard is one of the biggest catalysts behind the EJ movement.

Second, this clause has the potential of negating EPA's claim that an investigation of a complaint does not stay the permit at issue. If the hearing in question is part of a lengthy permitting process (the permit has not been issued within 180 days after the hearing), these provisions have the practical effect of staying the permit issuance until the allegations are addressed. Further, in support of this last point, in the process of dismissing premature complaints (complaints filed prior to the issuance of a

permit by the recipient), EPA intends to forward to the recipient a copy of the complaint so that the issues can be addressed during the permitting process (39673). In practical effect, both of these provisions act to stay the issuance of the permit.

5. Raising the Complaint Acceptance Bar

In EPA's commendable zeal to do justice to allegations and determine recipient compliance, there are no requirements being placed on complainants to prove that their allegations are true (39672). Complainants do not have the burden of presenting evidence to support their allegations or proving that their allegations are true (39693). Furthermore, complainants are not obligated to offer less discriminatory alternatives (39696). Complainants essentially simply need only complain. Absence of substantive criteria for acceptance of complaints could be an invitation for frivolous filings. From a practical implementation viewpoint, EPA could be swamped doing many underlying investigations of complaints filed as the result of people unhappy with a myriad of undesirable land use decisions by local governments, improperly taking advantage of the Title VI complaint process and OCR's largesse. EPA should specify criteria for complaints that contain more than just basic information, including as a minimum, previous or current emissions data and projected unmitigated emissions that is the source of the concern and that the recipient is overlooking.

6. Permit Renewals

The *Investigations Guidance* states that permit renewals that allow existing levels of stressors or predicted risks to continue unchanged, could be the basis of OCR initiating a Title VI investigation of a recipient's permitting program (39677). Furthermore, decreases in emissions at a facility that could be the basis of dismissing a challenge, should be in the same media, at the same facility and shall be contemporaneous (39677). Furthermore, banking over time is not a basis for a decrease dismissal (39677).

We again wish to reiterate that the Clean Air Act as well as state and local regulators have for years recognized the difference between the opportunities available for pollution control when constructing a new facility versus the reduced opportunities for facilities undergoing retrofits. Facilities undergoing modifications may have severe size, land, matching existing process and cost restrictions considerations that new construction never deals with to the same degree. Permit renewals are akin to the modifications subcategory. In the specific case where the facility is seeking a renewal and is emitting the status quo, they should not be held hostage for increased cleanup simply because a "betterment" must occur or because the neighborhood demographics (beyond their control) has changed.

Also, the contemporaneous emissions decreases at the *same* facility also seem to contradict the thrust of area wide agreements where multiple facilities may be involved. It may be cheaper for another lead smelter in the area to reduce emissions

rather than the target lead smelter that is the cause of the filing and this flexibility should not be discouraged.

7. Enhancement of the Permittee Role

The role of the permittee needs to be addressed. It is completely inappropriate for the recipient to discuss mitigation measures including the possible imposition of control technology or the exacting of emissions offsets without the input and concurrence of the permittee. It is not sufficient to leave communications between the recipients and their

permittees up to the goodwill of the recipients. At the very minimum, the permittees should receive copies of all correspondence passing between OCR and the recipient.

8. Overlooking Land Use Planning Concerns

LACSD does not believe that Title VI complaints can be investigated and resolved among complainants and recipients and OCR irrespective of the land use planning agencies that permitted the siting of the facility in the first place. All three parties must be involved in any dispute resolution. Both guidance documents continue to overlook the role of local governments and their land use planning authority. Training of local government land use planners to be more perceptive to and aware of environmental justice concerns should be undertaken by EPA and might be one prophylactic measure to minimize the possibility of Title VI complaints materializing in the future.

Again, we thank you for this opportunity to comment. Questions can be addressed to the undersigned below at 562.699.7411 x 2113.

Yours very truly,

James F. Stahl

Gregory M. Adams
Assistant Departmental Engineer
Office Engineering Department

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